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NOTES.

ADMISSIONS OF PARTIES "IDENTIFIED IN INTEREST."—If it be difficult to reach a rational explanation for the introduction of a party's own admissions,[1] it is still more perplexing to understand why he should be prejudiced by those of another. That both parties have the same reasons for speaking the truth is a generalization questionable even as a working hypothesis. Moreover, the carelessness of the utterances or the existence of ulterior motives is peculiarly difficult of proof. Yet the broad assertion is often made that, where parties are identified in interest, the admissions of the one are receivable against the other.[2] Under this statement are indiscriminately included admissions of parties in privity, of parties in joint interest, and of parties legally identified in person. The doctrine that the admissions of a predecessor in title are receivable, did not, however, originate in any conception of "identity of interest." In the early cases, it is treated as an exception to the Hearsay Rule, and the death of the

[1] 7 COLUMBIA LAW REVIEW, 118.
[2] Taylor, Evid. (8th Ed.) § 740; Greenl. Evid. (12th Ed.) § 171.

party who made the admissions had to be shown.[3] While this qualification is no longer necessary, even in late cases the assertion is sometimes made that such admissions are receivable because, being against interest, their truth is guaranteed.[4] It would seem, however, that the declaration need not have been against interest when made.[5] It was not until 1834 that the doctrine of identity of interest was applied to this class of cases.[6] Its adoption may be attributed to the lack of a more satisfactory explanation. To say that the prior owner burdened the property by his admissions and that the purchaser takes it so burdened[7] would beg the question, for only on the assumption that the admissions are receivable, would the land be burdened. A further explanation has, however, been offered: that the predecessor in title is a silent witness to the case by virtue of his representations in the deed which the subsequent owner puts in evidence, and that the admissions are introduced to discredit his silent testimony.[8] This explanation gains force, at the expense of the doctrine of identity of interest, when it is considered that a disseisee's admissions are incompetent, on the usually stated ground that no privity exists. To the objection that only such declarations may be introduced as are made during ownership by the predecessor in title, it may with some reason be answered that declarations made after parting with title would be of such slight probative value as to be immaterial, hence incompetent. Though not completely satisfactory, this view is the most plausible yet advanced.

In admitting the declarations of parties in joint interest, two considerations no doubt influenced the courts: first, each party has the same reasons for speaking the truth;[9] second, the party making the admission was disqualified from testifying.[10] If the evidence could be treated as an exception to the Hearsay Rule, these considerations would properly apply; but, since today interest does not disqualify, the necessity for the introduction of such evidence no longer exists. Moreover, the first consideration, now the only possible basis for the introduction of such evidence, if valid, would require the reception, also, of admissions of parties having a community of interest.[11] "Identity of interest," in this class of cases, founded upon the assumption that each party has the same reasons for speaking the truth, is not only objectionable because of the lack of reason for allowing a party's case to be discredited by a chance saying of another, no matter how identical their interests,[12] but also because it is illogically applied. Ultimately, it is believed, such declarations are received in evidence not because of mere identity of interest, but because, from the relation of joint interest, the law implies that each party is for some purposes the agent for the other. Thus,

[3]Duckham *v.* Wallis (1805) 5 Esp. 251; Hedger *v.* Horton (1827) 3 C. & P. 179.

[4]Riddle *v.* Dixon (1845) 2 Penn. St. 372.

[5]Lady Dartmouth *v.* Roberts (1812) 16 East 234; Wig. Evid. § 1780 (5).

[6]Woolway *v.* Rowe (1834) 1 A. & E. 114.

[7]Spaulding *v.* Hollenbeck (1866) 35 N. Y. 204.

[8]See Ivat *v.* Finch (1808) 1 Taunt. 139; White *v.* Dinkins (1856) 19 Ga. 285; Edgar *v.* Richardson (1878) 33 Oh. St. 581.

[9]See Wig. Evid. § 1077.

[10]*Per* Le Blanc, J., King *v.* Hardwick (1809) 11 East 578; and see Brandt *v.* Klein (1820) 17 Johns. 335.

[11]Shaler *v.* Bumstead (1868) 99 Mass. 112, 127; Osgood *v.* Manhattan Co. (N. Y. 1824) 3 Cow. 612; *contra*, Brandt *v.* Klein, *supra*.

[12]See Brandram *v.* Wharton (1818) 1 B. & Ald. 463.

in one of the early leading cases, where the admission of one joint promisor was held to take the debt out of the Statute of Limitations, Lord Mansfield said, "Payment by one is payment for all, the one acting virtually as agent for the rest."[13] The doctrine of this case has been largely repudiated on the ground that such an admission amounts to a new promise, and that the agency between joint promisors does not extend so far,[14] but it has been retained in many jurisdictions in regard to other admissions.[15] Since the law is jealous of allowing one party to be bound by acts of another and will not imply an agency save in cases of gravest necessity,[16] it is difficult to conceive of the creation of an agency from the mere fact of joint interest. The New York rule is therefore preferable—that declarations of joint obligors are not receivable unless actual authority to make them be shown.[17] Thus everywhere today declarations of joint tortfeasors are excluded unless an actual conspiracy be shown,[18] and the admission of declarations of partners, sometimes placed on the ground of joint interest, can always be explained by the agency in fact existing between them.[19]

If these views are sound, the term "identity of interest" should be discarded. The competency of admissions of parties in joint interest should be determined by the safer criterion of legal identity of persons. Manifestly, identity of interest has no application to this class of cases—the admissions are receivable because the acts and declarations of an agent are in law those of the principal.[20] The confusion attributable to the notion of identity of interest is illustrated in a recent case. *Hellman* v. *Somerville* (Mo. 1908) 111 S. W. 30. A deposition of a conspirator made at a former trial was admitted against his co-conspirators. "Identity of interest" would justify this result. But, by the great weight of authority, the reception of the admissions of a conspirator is founded upon his actual authority to act for his fellows in pursuance of the common design. He must have made the declarations while acting in furtherance of this design.[21] In the principal case his authority had terminated, and his deposition was, therefore, incompetent evidence.

LIMITATIONS ON THE RIGHT TO SUBROGATION.—The doctrine of subrogation, applied originally in favor of sureties and insurers, has come to be invoked in a large variety of other situations, where substitution to the full rights and remedies of another affords the only adequate relief. Obviously, the limits of its operation are difficult to set. Little guidance is to be had from the commonly stated rule, "Subrogation is never granted

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[13]Whitcomb *v.* Whiting (1781) 2 Doug. 652; and see Burleigh *v.* Scott (1828) 8 B. & C. 36.

[14]Kallenbach *v.* Dickinson (1881) 100 Ill. 427.

[15]Walling *v.* Rosevelt (1837) 16 N. J. L. 41.

[16]Gwilliam *v.* Twist, L. R. [1895] 2 Q. B. 84.

[17]Van Keuren *v.* Parmelee (1849) 2 N. Y. 528; Wallis *v.* Tandall (1880) 81 N. Y. 164.

[18]Wilson *v.* O'Day (N. Y. 1874) 5 Daly 354.

[19]See 8 COLUMBIA LAW REVIEW 481.

[20]Franklin Bk. *v.* P. D. & M. etc. Co. (Md. 1839) 11 G. & J. 28.

[21]Garnsey *v.* Rhodes (1893) 138 N. Y. 461; Queen *v.* Blake (1844) 6 Q. B. 126.